NO. 80-317

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners

V.

WALTER CAMENISCH,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

W. O. SCHULTZ, II
General Attorney and
Associate General Counsel

ROBERT GIDDINGS
Attorney

Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701
(512) 471-7565

Of Counsel

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

LONNY F. ZWIENER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Counsel for Petitioner

TABLE OF CONTENTS

Page

RELEVANT DOCKET ENTRIES 1

VERIFIED COMPLAINT 4

EXHIBITS TO COMPLAINT 9-18

APPENDIX A TO MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION 20

MOTION TO DISMISS AND ORIGINAL ANSWER 23

STIPULATION OF FACTS 33-43

TRANSCRIPT OF HEARING ON PRELIMINARY INJUNCTION 44

EXHIBITS INTRODUCED AT HEARING 61-68

SURETY BOND 70

PLAINTIFF'S FIRST SET OF INTERROGATORIES 75

OBJECTIONS TO INTERROGATORIES 79

Relevant Docket Entries

03-01-78	1	Original Complaint, Filed.
03-01-78	2	Motion for Preliminary Injunction, WITH Memorandum in Support of Pltfs' Motion For Preliminary Injunction, Filed.
03-03-78		Notices of Hearing on Preliminary Injunction set for Thursday, May 11, 1978 @ 9:30 a.m. mailed to attys & Defts.,
03-03-78		Summ/Compl't issued to DUSM (5)
03-17-78	3	Summ/Compl't/Mtn for Prel. Inj., ret'd ex 3-14-78 to W. O. Schultz, Atty & Agt for Lorene Rogers, Pres U.T., by DUSM Atkison, Jr., Filed $3.00
03-09-78	4	Summ/Compl't/Mtn for Prel. Inj., ret'd ex 3-3-78 to Judy Johns, Desig. Agt for the U.T. by DUSM Atkison, Jr., Filed $3.00.
03-09-78	5	Summ/Compl't/Mtn for Prel. Inj., ret'd ex 3-3-78 to Judy Johns, Desig. Agt for Charles Le Maistre, Chancellor of UT by DUSM Atkison, Jr., Filed $3.00.
03-09-78	6	Summ/Compl't/Mtn for Prel. Inj., ret'd ex 3-9-78 to Allan Shivers by DUSM Hoffmann, Filed $3.00
03-09-78	7	Summ/Compl't/Mtn for Prel. Inj., ret'd *UN*-ex 3-9-78 to Robert Brown by DUSM Atkison, Jr., Filed (Ronald M. Brown only Brown at the U.T. campus)
03-24-78	8	Motions To Dismiss And Original *ANSWER*, Filed.
05-10-78	9	Memorandum in Opposition To Deft's Motion To Dismiss, WITH Attachments Filed.
05-11-78	10	Stipulation of Facts, WITH Exhibits #1,2,3,4, & 5.
05-11-78	11	*MINUTES OF CIVIL PROCEEDINGS* Pltf announced ready, Mr. Charmatz & Mr. Du Bow admitted for this case only, Lil Browning sworn as interpretor. Stipulations read into record. Pltfs Testimony began and concluded, Pltf.

rested.
Deft. rested without putting on any testimony.
Pltf argued
Deft argued
Pltfs presented rebuttal argument

05-11-78 12 WITNESSES SWORN List, Filed

05-11-78 13 PLAINTIFF'S EXHIBITS LIST, Exhibits #6 & 7 attached to List.

TAKEN UNDER ADVISEMENT

05-17-78 14 MEMORANDUM OPINION AND ORDER that a preliminary injunction issue as to Defts', in their official capacities, to procure an interpreter or other effective method of making orally delivered course materials available to Pltf during his completion of his Master's work at Deft. University. As a condition of such relief, Pltf shall post a security bond in the amt. of $3000.00 pending the outcome of this litigation pursuant to Rule 65(c), F.R.C.P. Further ORDERED that this action be STAYED, pending a final administrative determination on the merits, and that as a condition of prel inj relief, Pltf be required to initiate a compl't with HEW requesting the relief sought herein. Furthermore, the Court suggests Pltf consider seeking *amicus curiae* intervention in this matter by the Sec. of HEW, Filed.

05-17-78 14a Clerk's Judgment on Decision By The Court, Filed.

05-19-78 15 Application For Stay Pending Appeal by Defendants., Filed.

05-19-78 16 NOTICE OF APPEAL from the memorandum & order granting injunctive relief in favor of the pltf herein & against the defts, & this appeal is an interlocutory appeal as a matter of right pursuant to 28 U.S.C.

		1292(a)(1). Certified copies of the Notice of Appeal & docket sheets to the Fifth Circuit, cc to all attys.
05-22-78	17	ORDER Denying Defts' application for stay pending appeal, Filed.
06-05-78		Bond with National Surety Corporation surety, submitted for Judges' Approval, Filed.
05-30-78	18	Notice of filing of Compl't, etc., with the Office For Civil Rights Dept., of HEW from The Nat'l Assoc of the Deaf Legal Defense Fund. Filed.
06-05-78	19	ORDER Approving Pltfs' Bond with National Surety Corporation, Filed.
06-23-78	20	Order extending Time for Transmitting Record on Appeal, filed. Copy to parties and 5th Circuit Court of Appeals and Court rpr.
07-07-78	21	Transcript of Hearing on Preliminary Injunction, Filed.
06-28-78	22	ORDER that appellants' motion for stay pending appeal is DENIED, from the U.S. Court of Appeals for the Fifth Circuit, Filed.
06-28-78	23	CORRECTED ORDER that appellants' motion for stay pending appeal is DENIED, from the U.S. Court of Appeals for the Fifth Circuit, Filed.
07-12-78	24	Preliminary Order entered that discovery to be concluded by 12/12/78 and attnys to have preliminary conference by 1/12/79, Filed. Copy to attnys of record.
07-26-78		Entire original file, certified copy of docket sheet, and transmittal letter mailed to the Fifth Circuit Court of Appeals, also Transcript of proceedings on preliminary injunction, cc of transmittal to all attys of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

HEADING OMITTED

VERIFIED COMPLAINT
JURISDICTION

1. This is an action for declaratory, preliminary, and permanent injunctive relief on behalf of plaintiff, Walter Camenisch, a deaf graduate student at the University of Texas at Austin. Defendants have discriminated against the plaintiff by refusing to provide the plaintiff with interpreter services at University expense. Without a sign language interpreter, plaintiff is unable to understand and participate in the University classes. The failure of defendants to provide plaintiff with interpreter services violates the Rehabilitation Act of 1973, Section 504 29 U.S.C. § 794, as amended; in that both the Act and the regulation prohibit discrimination against handicapped persons by recipients of federal financial assistance. Plaintiff additionally claims a violation of the Fourteenth Amendment to the United States Constitution.

2. Jurisdiction over plaintiff's federal constitutional claim under the Fourteenth Amendment and plaintiff's statutory claim is conferred on this Court by 28 U.S.C. § 1341(3) and (4) and 28 U.S.C. § 2201.

3. Monetary damages are inadequate, as plaintiff's federal constitutional and statutory rights are being infringed. Plaintiff will suffer irreparable harm from defendants' actions, policies and practices, if the same are permitted to continue. Accordingly, injunctive relief is necessary.

PARTIES

4. Plaintiff, Walter Camenisch, is a citizen of the United States and a resident of Austin, Texas. He is deaf and therefore a handicapped individual within the meaning of § 7(6) of the Rehabilitation Act of 1973, 29 U.S.C. § 706(6).

He is acting Dean of Students on the East Campus of the Texas School for the Deaf, in Austin, Texas.

5. The defendant, University of Texas, is a private institution of higher learning, which receives both federal and state financial assistance.

6. The defendant, Charles A. LeMaistre, is the Chancellor of the University of Texas, and is responsible for the administration of defendant University. He is sued individually and in his official capacity.

7. The defendant, Allan Shivers, is the Chairman of the Board of Regents of the University of Texas, which establishes the policy of the defendant University. He is sued individually and in his official capacity.

8. The defendant Lorene Rogers, is the President of the University of Texas at Austin and is the chief administrative officer of the University. She is sued individually and in her official capacity.

9. The defendant, Ronald M. Brown, is the Vice President for Administrative Services of the University of Texas at Austin. He is sued individually and in his official capacity.

NATURE OF THE ACTION

10. Plaintiff is currently holding the position of Dean of Students on the East Campus of the Texas School for the Deaf. As this position requires a master's degree, plaintiff has been appointed on an acting basis and is required, by the Texas School for the Deaf, to take courses in Educational Administration in order to obtain his master's degree. See copy of a letter dated August 22, 1977, from Virgil E. Flathouse, Superintendent, Texas School for the Deaf, attached to this Complaint and marked Exhibit #1.

11. In the summer of 1977, plaintiff requested that the University of Texas at Austin provide funds for the payment of an interpreter so that he could attend classes at that institution during the winter and spring semesters. In a letter dated October, 1977, defendant, Ronald M. Brown, informed plaintiff that the University of Texas at Austin would not provide such funds. A copy of this letter is attached to this Complaint and marked Exhibit #2.

12. Plaintiff submitted a similar request to the Texas Rehabilitation Commission. In a letter dated October 11, 1977, the Texas Rehabilitation Commission advised plaintiff that the Commission would not provide plaintiff with funds for interpreter services. A copy of this letter is attached to this Complaint and marked Exhibit #3.

13. Plaintiff, through his attorney, again requested that the University of Texas at Austin provide funds for interpreter services in a letter dated December 12, 1977. A copy of this letter is attached to this complaint and marked Exhibit #4.

14. The December 21, 1977 letter from the defendant University, contained yet another refusal to provide funds for interpreter services. A copy of this letter is attached to this Complaint and marked Exhibit #5.

CLAIMS

First Claim: The Rehabilitation Act of 1973

15. The Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794, provides that:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

16. 45 C.F.R. § 84.44(d) provides that:

> (d) Auxiliary aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

17. The discriminatory denial by defendants of interpreter services at University expense to plaintiff, who has a hearing disability, violates plaintiff's rights under the Rehabilitation Act of 1973, and the regulation promulgated thereunder, 45 C.F.R. 84.44(d).

18. Defendants' policies and actions in denying interpreter services at University expense have no rational relationship to any governmental interest, and constitute invidious and arbitrary discrimination.

Second Claim: Denial Of Equal Protection

19. Defendants' policies and practices violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and state a claim under 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully prays that this Court:

1. Declare that the policy and practice of the defendants violates the Rehabilitation Act of 1973 and § 84.44 of the regulation to this Act, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

2. Preliminarily and permanently enjoin defendants, their agents, employees, successors in office, and all persons acting in concert with them from refusing to provide

interpreter services to the plaintiff at defendant's expense.

3. Preliminarily and permanently order defendants to appoint an interpreter for the plaintiff while he is a student in good standing at the defendant University.

4. Award plaintiff his costs and grant his attorneys a reasonable counsel fee.

5. Grant plaintiff such additional or alternative relief as this Court may deem necessary and proper.

6. Retain jurisdiction of this action until defendants have fully complied with the Order of this Court.

Respectfully submitted,

SIGNATURES AND VERIFICATION OMITTED

Exhibit #1

Texas School for the Deaf
1102 South Congress Avenue
Austin, Texas 78704
(512) 442-7821

August 22, 1977

TO WHOM IT MAY CONCERN:

This letter is to verify that the position of Dean of Students on the East Campus of the Texas School for the Deaf is now being filled by Mr. Walter Camenisch, and it does require a master's degree.

In view of the fact that Mr. Camenisch does not yet have a master's degree, he has been appointed to this position on an acting basis.

Sincerely,
/s/ V. Flathouse
Virgil E. Flathouse, Ph.D.
Superintendent

VEF:sm

Exhibit #2

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
AUSTIN, TEXAS 78712

October 21, 1977

Walter Camenisch
4705 Trailcrest Circle
Austin, Texas 78735

Dear Mr. Camenisch:

It is my understanding that you have requested financial assistance for an interpreter for the deaf and that you have met with Mrs. Shirley Binder, Director of Student Financial Aid, in this regard. It is also my understanding that this request is related to your interpretation of Section 504 of the Rehabilitation Act of 1973, and I am writing you in my role as Coordinator of the University's implementation of those regulations.

We anticipate that there may be instances where The University of Texas at Austin will consider the possibility of providing individual services such as these when properly advised and they are not available from such agencies as the Texas Rehabilitation Commission or the Texas Commission for the Deaf. However, as a matter of policy we have determined that such assistance will be based on a reasonable interpretation of financial need on an individual basis, using guidelines already in effect for Federal and other financial assistance. Mrs. Binder informs me that you do not have financial need according to these guidelines, so we shall not provide this aid unless your circumstances change.

If you have further questions concerning your situation, you should feel free to contact Ms. Dora Savedra in the Of-

fice of the Dean of Students.

Sincerely,
/s/ Ronald M. Brown
Ronald M. Brown
Vice President for Administrative Services

RMB/mam

cc: Shirley Binder
Dora Savedra

Exhibit #3

VOCATIONAL REHABILITATION DIVISION
OF THE
TEXAS REHABILITATION COMMISSION

October 11, 1977

Mr. Walter Camenisch
4705 Trail Crest Circle
Austin, Texas 78735

Dear Mr. Camenisch:

After careful consideration, I have determined that you do not meet the requirement of having a substantial employment handicap in order to qualify for our services.

Therefore, the Texas Rehabilitation Commission is unable to assist you in obtaining your Master's Degree.

You have the right to appeal this decision. If you wish to appeal or if you have any questions, please contact me.

Sincerely,
/s/ Billy Floerke
Billy Floerke, Counselor
105 West Riverside Drive
Austin, Texas 78704

BF/jh

cc: file

Enclosures

Exhibit #4

THE NATIONAL CENTER FOR LAW AND THE DEAF LEGAL DEFENSE FUND

December 12, 1977

Lorene Rogers, President
The University of Texas at Austin
O. Henry Building
601 Colorado
Austin, Texas 78712

Dear Ms. Rogers:

We are writing to you on behalf of our client, Walter Camenisch, who is deaf, regarding the refusal of the University of Texas at Austin to provide him with interpreter services for his classes.

The regulation to Section 504 of the 1973 Rehabilitation Act provides that it is the responsibility of colleges and universities that receive federal financial assistance to make their programs accessible to qualified deaf students through the use of auxiliary aids, specifically including interpreter. Section 84.44(d) states:

> (d) Auxiliary Aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.

(2) Auxiliary aids may include interpreters or other effective methods of making orally delivered materials available to students with hearing disabilities.

Two federal courts have ordered colleges and universities to provide interpreter services at the college's expense pursuant to the above regulation. I am enclosing a copy of the Opinion in *Barnes v. Converse College* and *Crawford v. University of North Carolina*. I am sure that after you read these opinions there will be no doubt that it is the responsibility of the University of Texas to provide Mr. Camenisch with a qualified interpreter for his classes.

Mr. Camenisch's schedules are as follows:

FALL: Ed. A. 382M 33640 3 Credit hours
Ed. A. 383 33665 3 " "

SPRING: Ed. A. 384G 33445 3 Credit hours
Ed. A. 383 33410 3 " "
Ed. A. 381 32780 3 " "

Please contact us within 10 days as to your position on this matter.

Very truly yours,

Marc P. Charmatz

MPC:es
Enc.
cc: Walter Camenisch
Ronald M. Brown, Vice President for Administrative Services
Claire Buie

Exhibit #5

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
AUSTIN, TEXAS 78712

December 21, 1977

Mr. Marc P. Charmatz
The National Center for Law
and the Deaf Legal Defense Fund
7th and Florida Avenues, N.E.
Washington, D.C. 20002

Dear Mr. Charmatz:

I am writing in response to your letter of December 12 and on behalf of President Rogers, who is ill. It is the University's position that there may be occasions when we would pay for an interpreter for a deaf student; however, we believe that responsible stewardship of public funds requires us to utilize the same tests of need as are used for other kinds of financial aid. These tests are the ones prescribed by the Department of Health, Education and Welfare for other programs of financial assistance. We believe that this position is consistent with both the letter and the spirit of the Federal regulations implementing Section 504 of the Rehabilitation Act of 1973.

Sincerely yours,

G. J. Fonken
Executive Assistant
to the President

GJF:pm

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

WALTER CAMENISCH,	)
	)
Plaintiff,	)
	)
v.	)
	)
CHARLES A. LeMAISTRE, et al.,	)
	)
Defendants.	)

MOTION FOR PRELIMINARY INJUNCTION

The plaintiff moves this Court for a preliminary injunction enjoining the defendants, their agents, employees, successors in office, and all persons acting in concert with them from refusing to provide interpreter services to plaintiff at the defendant University's expense. In support of said motion, plaintiff states that:

1. Plaintiff is currently holding the position of Dean of Students on the East Campus of the Texas School for the Deaf. As this position requires a master's degree, plaintiff has been appointed on an acting basis and is required, by the Texas School for the Deaf, to take courses in Educational Administration in order to obtain his master's degree. See Exhibit #1 to plaintiff's verified complaint.

2. In the summer of 1977, plaintiff requested that the University of Texas at Austin provide funds for the payment of an interpreter so that he could attend classes at that institution during the winter and spring semester. In a letter dated October 21, 1977, defendant Ronald M. Brown informed plaintiff that the University would not provide such funds. See Exhibit #2 to plaintiff's verified complaint.

3. Plaintiff submitted a similar request to the Texas Rehabilitation Commission. In a letter dated October 11, 1977, the Texas Rehabilitation Commission advised plaintiff that

the Commission would not provide plaintiff with funds for interpreter services. See Exhibit #3 to plaintiff's Verified Complaint.

4. Plaintiff, through his attorney, again requested that the University of Texas at Austin provide funds for interpreter services, in a letter dated December 12, 1977. See Exhibit #4 to plaintiff's Verified Complaint.

5. The December 21, 1977 response from the defendant University contained yet another refusal to provide the funds for interpreter services. See Exhibit #5 to plaintiff's Verified Complaint.

6. Defendant's refusal to provide interpreter services so that plaintiff can attend classes at the University of Texas at Austin violates plaintiff's constitutional and statutory rights.

7. Defendant's refusal to provide interpreter services for plaintiff has resulted in and will continue to result in irreparable injury to the plaintiff.

8. The issuance of such equitable relief herein will not cause undue loss to defendants but will prevent irreparable injury to plaintiff.

9. The public interest in securing equal educational opportunities for all, including the deaf, and having qualified deaf administrators and teachers at educational institutions for the deaf as mandated by Congress and the Department of Health, Education and Welfare, will be frustrated unless an injunction is issued.

WHEREFORE, plaintiff prays that this Court enter preliminary injunctive relief enjoining the defendants from refusing to provide interpreter services at the defendants' expense for the plaintiff so that he can take the courses which are necessary for his continued employment.

Respectfully submitted,
/s/ Marc P. Charmatz

Marc P. Charmatz
Sy DuBow
National Association of the Deaf
Legal Defense Fund
P.O. Box 1793
Washington, D.C. 20002
(2)2 547-0540

Charles Smith
812 San Antonio, Suite G-11
Austin, Texas 78701
(512) 472-9232

MEMORANDUM IN SUPPORT OF PLAINTIFFS MOTION FOR PRELIMINARY INJUNCTION

OMITTED

APPENDIX "A" to Memorandum in Support of Plaintiffs Motion for Preliminary Injunction

(Other Attachments Omitted)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
ASSURANCE OF COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED

The undersigned (hereinafter called the "recipient") HEREBY AGREES THAT it will comply with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C 794), all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto.

Pursuant to § 84.5(a) of the regulation [45 C.F.R. 84.5(a)], the recipient gives this Assurance in consideration of and for the purpose of obtaining any and all federal grants, loans, contracts (except procurement contracts and contracts of insurance or guaranty), property, discounts, or other federal financial assistance extended by the Department of Health, Education, and Welfare after the date of this Assurance, including payments or other assistance made after such date on applications for federal financial assistance that were approved before such date. The recipient recognizes and agrees that such federal financial assistance will be extended in reliance on the representations and agreements made in this Assurance and that the United States will have the right to enforce this Assurance through lawful means. This Assurance is binding on the recipient, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this Assurance on behalf of the recipient.

This Assurance obligates the recipient for the period during which federal financial assistance is extended to it by the Department of Health, Education, and Welfare or, where the assistance is in the form of real or personal property, for the period provided for in § 84.5(b) of the regulation [45 C.F.R. 84.5(b)].

The recipient: [Check (a) or (b)]

a. ( ) employs fewer than fifteen persons;

b. (xx) employs fifteen or more persons and, pursuant to § 84.7(a) of the regulation [45 C.F.R. 84.7(a)], has designated the following person(s) to coordinate its efforts to comply with the HEW regulation:

Ronald M. Brown, Vice President for Administrative Services
P.O. Box 8179, University Station
Austin, Texas 78712
Name of Designee(s)—Type or Print

The University of Texas at Austin	Drawer T, University Station
Name of Recipient—Type or Print	Street Address or P.O. Box
746000203-W	Austin
(IRS) Employer Identification Number	City
	Texas 78712
	State Zip

I certify that the above information is complete and correct to the best of my knowledge.

20 July 1977
Date

/s/ Lorene L. Rogers
Signature and Title of Authorized Official
Lorene L. Rogers, President

If there has been a change in name or ownership within the last year, please PRINT the former name below:

NOTE: The 'A', 'B', and 'C' followed by numbers are for computer use. Please disregard.
PLEASE RETURN ORIGINAL TO: Office for Civil Rights, HEW, P.O. TEXAS AT AUSTIN, U OF, AUSTIN TX 78712

SUMMONS AND RETURNS

OMITTED

HEADING CAPTION OMITTED

MOTIONS TO DISMISS AND ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants The University of Texas and Charles A. LeMaistre, individually and in his official capacity as Chancellor of the University of Texas and Allan Shivers, individually and in his official capacity as Chairman of the Board of Regents of the University of Texas and Lorene Rogers, individually and in her official capacity as President of the University of Texas at Austin, and Robert Brown, individually and in his official capacity as Vice President for Administrative Services of the University of Texas at Austin, herein and file this their motions to dismiss under Rule 12(b), F.R.C.P. and original answer and in support thereof would show the Court the following:

MOTION TO DISMISS FOR LACK OF JURISDICTION AND BRIEF IN SUPPORT THEREOF

I.

Defendants respectfully move the Court to dismiss this cause of action for lack of jurisdiction on the grounds that the remedies for implementation of Section 504, of the Rehabilitation Act of 1973, are specifically set forth in the regulations promulgated thereunder and a private cause of action is not proper prior to the exhaustion of such remedies. Plaintiff has not alleged that any attempts to seek enforcement of this alleged complaint have been pursued through the administrative procedures set forth to provide such enforcement.

Plaintiff's cause of action is asserted to be one falling under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, prohibiting discrimination against handicapped persons by recipients of federal financial assistance. Following the passage of this statute, regulations were promulgated pursuant thereto which are found at Ti-

tle 45 Code of Federal Regulations, Subtitle A, Part 84 and may also be found at Volume 42 Federal Register, No. 86—Wednesday, May 4, 1977. The regulations promulgated pursuant to aid statute contain an elaborate administrative procedure whereby the Department of Health, Education and Welfare may take steps to implement the provisions of this statute or if no compliance is forthcoming, take steps to prevent the granting of federal assistance to the recipients covered by this statute and regulations. The authority of the federal government to promulgate such statute and regulations rests upon the granting of federal assistance to the recipients. The enforcement of such regulations is by a mechanism designed to deny federal assistance to recipients who fail to comply with the provisions of the regulations. In Appendix A—Analysis of Final Regulation, found at page 22685 of Vol. 42, Federal Register, No. 86, the purpose of these procedures is discussed at Subpart G in the following wording:

> "In Section 84.61, the Secretary has adopted the Title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department."

It is clear from the wording of this commentary that the implementation and enforcement of Section 504 is intended to be accomplished through the procedures set out in such regulation and not through a private cause of action in the federal courts. It would also appear that these regulations are intended to be implemented and enforced as are "all of the civil rights statutes and executive orders administered by the Department." One such statute which is analogous to Section 504 in that it is enforced through the denial of federal funds is Title IX of the Education Amendments of 1972. Federal courts have recently held that Title IX does not create a private cause of action, but rather is intended

to be enforced through the mechanisms set out to be followed by the Department of Health Education and Welfare. See *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir., 1976). The Court in *Cannon* recognized the principle that where no specific private cause of action is granted by a statute, the courts should not expand it to provide one, particularly where a scheme of administrative enforcement is contained in the statute. The Court cited the U.S. Supreme Court in *National Railroad Passenger Corp. (Amtrak) v. National Association of Railroad Passengers*, 414 U.S. 453 (1974), stating:

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." [citing *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929).]

It is important to note in this connection that the Seventh Circuit decision setting forth the right of a private cause of action under Section 504 of the Rehabilitation Act of 1973 was decided prior to the promulgation of effective enforcement regulations. The Court, in that opinion, *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (1977), specifically stated in a footnote at page 1286:

> We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. . . . But assuming a meaningful administrative enforcement mechanism, the private cause of action under Sec-

tion 504 should be limited to *a posteriori* judicial review.

That decision was dated January 18, 1977. The regulations under Section 504 referred to above became effective June 3, 1977. With the promulgation of such regulations, the defendants contend any judicial cause of action would be proper only after the remedies provided for in such regulations have been exhausted. See also *Rogers v. Frito-Lay, Inc.*, 433 F. Supp 200 (N.D. Tx., 1977). It should be noted that *Lloyd* involved transportation and concerned other regulations in addition to those under Section 504. See also *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir., 1977) for a discussion of the effect of the transportation regulations which were at issue in *Lloyd* but are not at issue in this case.

II.

Defendants would respectfully move the Court, in the alternative, to dismiss this cause of action as to the University of Texas and all defendants in their respective official capacities as this cause of action is barred by the Eleventh Amendment to the Constitution of the United States as to the state defendants.

As urged above, Defendants contend that the plaintiff's cause of action is not one which can arise under Section 504 of the Rehabilitation Act of 1973, and, therefore, is not an action under which jurisdiction can be conferred over the State of Texas without violating the provisions of the Eleventh Amendment. A suit against a state agency, its political subdivisions and its officers, agents and employees acting in their official capacity is an action against the State of Texas, and as such is barred by the Eleventh Amendment to the Constitution of the United States absent consent to sue on behalf of the State or specific authority to file such suit under applicable federal statutes based upon constitutional provisions. No consent to sue the State has been pled by plaintiff, and defendants contend that the provisions of

Section 504 of the Rehabilitation Act of 1973 are not sufficient to grant a private cause of action against the State of Texas, its officers, agents or employees.

ORIGINAL ANSWER

Subject to the above and foregoing motions to dismiss under Rule 12(b), F.R.C.P., Defendants file this their original answer and in support thereof would show the Court the following:

III.

Defendants admit that the statutes and Constitutional Amendments cited in plaintiff's Verified Complaint, paragraphs 1, and 2 are statutes and amendments as cited, but deny that they grant any cause of action as to defendants.

IV.

Defendants deny the allegations in paragraph 3 of Verified Complaint.

V.

Defendants can neither admit nor deny the allegations of paragraph 4 of Verified Complaint.

VI.

Defendants deny that the University of Texas is a private institution as alleged in paragraph 5 of Verified Complaint and demand strict proof thereof; however, defendants admit that the University of Texas is a recipient of both federal and state assistance.

VII.

Defendants admit the allegations of paragraph 6, 7, 8 and 9 insofar as they correctly state the offices of the individuals named, but defendants deny that plaintiff has any cause of action against such individuals either individually or in their respective official capacities.

VIII.

Defendants can neither admit nor deny the allegations of paragraph 10 of Verified Complaint.

IX.

Defendants admit that the exhibits referred to in paragraphs 11, 12, 13 and 14 of Verified Complaint are attached to said complaint.

X.

Defendants admit that the Rehabilitation Act of 1973, Section 504, 29 U.S.C. Section 794 is a statute, and that 45 C.F.R. Section 84.44(d) contains regulations promulgated under such statute as alleged in paragraphs 15 and 16 of Verified Complaint, but deny that a cause of action exists under such statute or regulations as to Defendants and denies that the cited portion of that regulation is within the scope and authority of the Department of Health, Education and Welfare's authority to promulgate regulations under Section 504, 29 U.S.C. 794.

XI.

Defendants deny the allegations of paragraphs 17, 18 and 19 of Verified Complaint, and denies that plaintiff is entitled to any of the relief prayed for in said complaint.

XII.

Defendants deny all allegations of said Verified Complaint which have not been specifically admitted herein, or of which Defendants have specifically set forth their inability to admit or deny.

WHEREFORE, Defendants pray that their motions to dismiss be sustained, and alternatively, that plaintiff take nothing by his cause of action against them, that they have their costs, and for such other and further relief, both general and special, in law or equity, as to which defendants may show themselves justly entitled.

Signatures and Certificate of Service Omitted

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

OMITTED

STIPULATION OF FACTS

Plaintiff and the defendants hereby agree to stipulate to the following facts:

1. Plaintiff is a deaf man and is a graduate student at the University of Texas at Austin.
2. Defendant, University of Texas, is a state-supported institution of higher education which receives federal financial assistance from the United States.
3. Defendant Charles A. LeMaistre was Chancellor of the University of Texas at the inception of this suit.
4. Defendant Allan Shivers is Chairman of the Board of Regents of the University of Texas.
5. Defendant Lorene Rogers is President of the University of Texas at Austin.
6. Defendant Robert Brown is Vice-President for Administrative Affairs of the University of Texas at Austin.
7. Plaintiff is a handicapped individual, as defined in 29 U.S.C. Section 706 (6):

> . . . any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (b) has a record of such an impairment or (c) is regarded as having such an impairment . . .

8. Plaintiff is a qualified handicapped individual, as defined in 45 C.F.R. Section 84.3(k) (3) of the HEW regulation to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794:

> . . . with respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

9. Plaintiff is employed at the Texas School for the Deaf at Austin, Texas. He earns a salary of approximately $11,100 per year. He is married and has no dependents. He and his wife together have a combined gross income in excess of $23,000.00 annually. He does not meet the University of Texas at Austin Office of Financial Aid established criteria for financial assistance to graduate students even when the expenses of the interpreter are added to his expenses for determining this criteria. His employment is contingent upon his supplementing his education. Plaintiff is taking courses at the University to obtain his master's degree and to become Dean of Students on the East Campus of the Texas School for the Deaf. As this position requires a Master's Degree, plaintiff has been appointed on an acting basis. If plaintiff does not have the services of a qualified interpreter, he will not be able to successfully participate in and complete the academic program and he will not be able to earn his Master's Degree and will lose his position as Acting Dean of Students. Plaintiff plans to take at least three hours of graduate courses in the summer of 1978, at the University of Texas.

10. Plaintiff is a deaf man who needs the services of a qualified interpreter in order to effectively participate in the educational program operated by the defendants. The term "qualified interpreter" means an interpreter who is able to simultaneously and accurately send and receive communication through sign language to a deaf person.

11. In the fall of 1977, plaintiff requested that the University of Texas at Austin provide funds for the payment of an interpreter so that he could attend classes at that institution. In a letter dated October 21, 1977, defendant, Ronald M. Brown, informed plaintiff that the University of Texas at Austin would not provide such funds (See attached Exhibit No. 1).

12. In a letter dated October 22, 1977, plaintiff again requested that the University of Texas at Austin provide funds for the payment of interpreters (See attached Exhibit No. 2).

13. Plaintiff submitted a similar request to the Texas Rehabilitation Commission which advised plaintiff that the Commission would not provide plaintiff with funds for interpreter services.

14. Plaintiff, through his attorney, again requested that the University of Texas provide funds for interpreter services in a letter dated December 12, 1977 (See attached Exhibit No. 3).

15. The December 21, 1977 letter from defendant University, contained yet another refusal to provide funds for interpreter services (See attached Exhibit No. 4).

16. Defendants to this date have not provided interpreter services to plaintiff, while he has been a student at said University in good standing. He paid $1245 for interpreter services for *9* courses at the University of Texas at Austin during his graduate studies.

17. Defendant Lorene L. Rogers, on behalf of the University of Texas at Austin, has signed and filed an Assurance of Compliance form, agreeing to comply with Section 504 of the Rehabilitation Act of 1973, as a condition to receiving federal financial assistance (see attached Exhibit No. 5).

18. University of Texas at Austin receives federal financial assistance in excess of $31,400,000. The budget of UTA for the year ending August 31, 1978, is in excess of *$200,000,000*.

Signatures Omitted

PLAINTIFF'S EXHIBIT #1

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
AUSTIN, TEXAS 78712

October 21, 1977

Walter Camenisch
4705 Trailcrest Circle
Austin, Texas 78735

Dear Mr. Camenisch:

It is my understanding that you have requested financial assistance for an interpreter for the deaf and that you have met with Mrs. Shirley Binder, Director of Student Financial Aid, in this regard. It is also my understanding that this request is related to your interpretation of Section 504 of the Rehabilitation Act of 1973, and I am writing you in my role as Coordinator of the University's implementation of those regulations.

We anticipate that there may be instances where The University of Texas at Austin will consider the possibility of providing individual services such as these when properly advised and they are not available from such agencies as the Texas Rehabilitation Commission or the Texas Commission for the Deaf. However, as a matter of policy we have determined that such assistance will be based on a reasonable interpretation of financial need on an individual basis, using guidelines already in effect for Federal and other financial assistance. Mrs. Binder informs me that you do not have financial need according to these guidelines, so we shall not provide this aid unless your circumstances change.

If you have further questions concerning your situation, you should feel free to contact Ms. Dora Savedra in the Office of the Dean of Students.

Sincerely,
/s/ Ronald M. Brown
Ronald M. Brown
Vice President for Administrative Services

RMB/mam

cc: Shirley Binder
Dora Savedra

PLAINTIFF'S EXHIBIT #2

Doris Sevedras
Dean of Students Office
Minority and Handicapped Student Services
Room 101
University of Texas
Austin

Dear Ms. Sevedras,

I am writing this letter to inform you of my meeting with Shirley Binder who is the Director of Financial Student Aids Office last week.

I am disappointed about the policy for providing the student aid for those students who earn less income than its total budget for a student to enter the University of Texas.

I think it is not fair since I spent so much money for my interpreter to help me understand my professors' lectures and all that in class. (I am deaf.) It is discriminating against the deaf people. The reason that I objected is that I have to pay my interpreter out of my pocket while normal hearing students do not have to worry about that.

It costs a lot of money and a lot of time in getting a good interpreter. I am very lucky to get an interpreter who will do at half of what is the usual cost for him to do. An interpreter who has the highest qualification and is certificated usually charges $7.50 an hour. It would cost me $600.00 to have an interpreter which is four times more than the cost of tuition for me to pay at the University.

I also have to pay some to make copies of taken notes that I borrow from the classmates. That would cost me about $40.00. It would not be possible for me to take notes and watch my interpreter at the same time since I can't hear.

There is a law Section 504 of the Rehabilitation Act. I got its quote from the law and it said no handicapped student may be denied access to necessary auxiliary educational aids.

I wish to express myself that I am a first-class taxpayer like all other normal hearing people. I don't get any exception like other handicapped people from paying income tax. I demand that the personnel at UT pay attention to my case.

Thank you for listening.

I hope to hear from you soon.

Sincerely,

Walter Camenisch
4705 Trail Crest Circle
Austin 78735

PLAINTIFF'S EXHIBIT # 3

THE NATIONAL CENTER FOR LAW AND THE DEAF LEGAL DEFENSE FUND

December 12, 1977

Lorene Rogers, President
The University of Texas at Austin
O. Henry Building
601 Colorado
Austin, Texas 78712

Dear Ms. Rogers:

We are writing to you on behalf of our client, Walter Camenisch, who is deaf, regarding the refusal of the University of Texas at Austin to provide him with interpreter services for his classes.

The regulation to Section 504 of the 1973 Rehabilitation Act provides that it is the responsibility of colleges and universities that receive federal financial assistance to make their programs accessible to qualified deaf students through the use of auxiliary aids, specifically including interpreter. Section 84.44(d) states:

> (d) Auxiliary Aids. (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.
>
> (2) Auxiliary aids may include interpreters or other effective methods of making orally delivered materials available to students with hearing disabilities.

Two federal courts have ordered colleges and universities to provide interpreter services at the college's expense pursuant to the above regulation. I am enclosing a copy of the Opinion in *Barnes v. Converse College* and *Crawford v. University of North Carolina*. I am sure that after you read these opinions there will be no doubt that it is the responsibility of the University of Texas to provide Mr. Camenisch with a qualified interpreter for his classes.

Mr. Camenisch's schedules are as follows:

FALL:	Ed. A. 382M	33640	3	Credit hours
	Ed. A. 383	33665	3	" "
SPRING:	Ed. A. 384G	33445	3	Credit hours
	Ed. A. 383	33410	3	" "
	Ed. A. 381	32780	3	" "

Please contact us within 10 days as to your position on this matter.

Very truly yours,

Marc P. Charmatz

MPC:es
Enc.
cc: Walter Camenisch
Ronald M. Brown, Vice President for Administrative Services
Claire Buie

Plaintiff's Exhibit #4

THE UNIVERSITY OF TEXAS AT AUSTIN
OFFICE OF THE PRESIDENT
AUSTIN, TEXAS 78712

December 21, 1977

Mr. Marc P. Charmatz
The National Center for Law
and the Deaf Legal Defense Fund
7th and Florida Avenues, N.E.
Washington, D. C. 20002

Dear Mr. Charmatz:

I am writing in response to your letter of December 12 and on behalf of President Rogers, who is ill. It is the University's position that there may be occasions when we would pay for an interpreter for a deaf student; however, we believe that responsible stewardship of public funds requires us to utilize the same tests of need as are used for other kinds of financial aid. These tests are the ones prescribed by the Department of Health, Education and Welfare for other programs of financial assistance. We believe that this position is consistent with both the letter and the spirit of the Federal regulations implementing Section 504 of the Rehabilitation Act of 1973.

Sincerely yours,

G. J. Fonken
Executive Assistant
to the President

GJF:pm

Plaintiff's Exhibit #5

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
ASSURANCE OF COMPLIANCE WITH SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED

The undersigned (hereinafter called the "recipient") HEREBY AGREES THAT it will comply with section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), all requirements imposed by the applicable HEW regulation (45 C.F.R. Part 84), and all guidelines and interpretations issued pursuant thereto.

Pursuant to § 84.5(a) of the regulation [45 C.F.R. 84.5(a)], the recipient gives this Assurance in consideration of and for the purpose of obtaining any and all federal grants, loans, contracts (except procurement contracts and contracts of insurance or guaranty), property, discounts, or other federal financial assistance extended by the Department of Health, Education, and Welfare after the date of this Assurance, including payments or other assistance made after such date on applications for federal financial assistance that were approved before such date. The recipient recognizes and agrees that such federal financial assistance will be extended in reliance on the representations and agreements made in this Assurance and that the United States will have the right to enforce this Assurance through lawful means. This Assurance is binding on the recipient, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this Assurance on behalf of the recipient.

This Assurance obligates the recipient for the period during which federal financial assistance is extended to it by the Department of Health, Education, and Welfare or, where the assistance is in the form of real or personal property, for the period provided for in § 84.5(b) of the regulation [45 C.F.R. 84.5(b)].

The recipient: [Check (a) or (b)]

a. ( ) employs fewer than fifteen persons;

b. (xx) employs fifteen or more persons and, pursuant to § 84.7(a) of the regulation [45 C.F.R. 84.7(a)], has designated the following person(s) to coordinate its efforts to comply with the HEW regulation:

Ronald M. Brown, Vice President for Administrative Services
P.O. Box 8179, University Station
Austin, Texas 78712
Name of Designee(s)—Type or Print

The University of Texas at Austin	Drawer T, University Station
Name of Recipient—Type or Print	Street Address or P.O. Box
746000203-W	Austin
(IRS) Employer Identification Number	City
	Texas 78712
	State Zip

I certify that the above information is complete and correct to the best of my knowledge.

20 July 1977	/s/Lorene L. Rogers
Date	Signature and Title of Authorized Official
	Lorene L. Rogers, President

If there has been a change in name or ownership within the last year, please PRINT the former name below:

NOTE: The 'A', 'B', and 'C' followed by numbers are for computer use. Please disregard.
PLEASE RETURN ORIGINAL TO: Office for Civil Rights, HEW, P.O. TEXAS AT AUSTIN, U OF, AUSTIN TX 78712

TRANSCRIPT OF HEARING ON PRELIMINARY INJUNCTION A-78-CA-0061

(Docket No. 21)

U.S. Court of Appeals #78-2191

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

WALTER CAMENISCH)
VS. (NO. A-78-CA-0061
THE UNIVERSITY OF TEXAS,)
ET AL

TRANSCRIPT OF HEARING ON PRELIMINARY INJUNCTION

APPEARANCES:

CHARLES SMITH, ESQUIRE and MARC P. CHARMATZ, ESQUIRE, and SY DuBOW, ESQUIRE
Appearing for Plaintiff;
THE ATTORNEY GENERAL OF TEXAS
By: Ms. Martha Allan, Asst.
Appearing for Defendant.

BE IT REMEMBERED that on the 11th day of May, 1978, in the Austin Division of the United States District Court, Western District of Texas, before THE HONORABLE JACK ROBERTS, judge of said court, the above numbered and styled cause came on for Hearing on Preliminary Injunction; whereupon, the following proceedings were had:

THE COURT: All right.

THE CLERK: The Court now calls A-78-CA-0061, Walter Camenisch versus The University of Texas and Charles LeMaistre, Allan Shivers, Lorene Rogers and Robert Brown, for Hearing on Preliminary Injunction.

MR. SMITH: The plaintiff is ready, your Honor. Charley Smith for the plaintiff. And I would ask the Court's permission for Marc Charmatz and Sy DuBow to appear in this cause. Mr. Charmatz is admitted to practice in the Federal District Courts in Maryland and before the Fourth Circuit. Mr. DuBow is authorized to practice before the U.S. District Courts in Virginia, Washington, D.C. and the Fourth Circuit and the U.S. Supreme Court.

THE COURT: Have you filed applications to be admitted to practice in the Western District of Texas?

MR. SMITH: No, your Honor, we haven't.

THE COURT: Well, if you come back down here very often you will have to file an application. For this case, you will be permitted to proceed.

MR. SMITH: Thank you, your Honor.

MR. CHARMATZ: Your Honor, may I approach the bench? Your Honor, for purposes of this case, I would like to introduce Miss Lil Browning and ask the Court that she be permitted to serve as the interpreter in this case.

THE COURT: All right.

MR. CHARMATZ: I believe, your Honor, there is no objection.

THE COURT: Do you want her sworn?

Ms. Allan: Yes, your Honor, we have no objection to stipulate as to her qualifications.

THE COURT: But, do you want her to be administered the oath?

Ms. Allan: Yes, your Honor.

THE COURT: All right. Come up here, please, ma'am, and raise your right hand and take the oath as the interpreter.

(the interpreter was duly sworn)

THE COURT: All right. Go ahead.

MR. CHARMATZ: Your Honor, plaintiff and defendant have entered into a Stipulation of Facts, which I would like to read into the record.

First: That the plaintiff is a deaf man and is a graduate student at the University of Texas at Austin.

Second: Defendant, University of Texas, is a State supported institution of higher education, which receives federal financial assistance from the United States.

Three: The defendant, Charles LeMaistre, is the Chancellor at the University of Texas at the inception of this suit.

Four: Defendant, Allan Shivers, is Chairman of the Board of Regents at the University of Texas.

Five: Defendant, Lorene Rogers, is President of the University of Texas at Austin.

Six: Defendant, Robert Brown, is Vice-president for administrative affairs of the University of Texas at Austin.

Seven: Plaintiff is a handicapped individual, as defined in 29 U.S.C., Section 706(6). Any person who (a) has a physical or mental impairment which substantially limits one or more of such person's major life activities (b) has a record of such an impairment or (c) is regarded as having such an impairment.

Eight: Plaintiff is a qualified handicapped individual as defined in 45 C.F.R., Section 84.3(k), (3) of the H.E.W. regulations, Section 504 of the rehabilitation act of 1973, 29 U.S.C., Section 794. And that is defined as: With respect to both secondary and vocational education services a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient education program or activity.

Nine: Plaintiff is employed at the Texas School for the Deaf at Austin, Texas. He earns a salary of approximately $11,100.00 per year. He is married and has no dependents. He and his wife together have a combined gross income of in excess of $23,000.00 annually. He does not meet the University of Texas at Austin's Office of Financial Aid established criteria for financial assistance to graduate students, even when the expenses of the interpreter are added to his expenses for determining this criteria. His employment is contingent upon his supplementing his education. Plaintiff is taking courses at the University to obtain his master's

degree and to become Dean of Students on the East Campus of the Texas School for the Deaf. As this position requires a master's degree, plaintiff has been appointed on an acting basis. If plaintiff does not have the services of a qualified interpreter, he will not be able to successfully participate in and complete the academic program, and he will not be able to earn his master's degree and will lose his position as acting Dean of Students. Plaintiff plans to take at least three hours of graduate courses in the Summer of 1978 at the University of Texas.

Ten: Plaintiff is a deaf man who needs the services of a qualified interpreter in order to effectively participate in the educational program operated by the defendant. The term "qualified interpreter" means an interpreter who is able to simultaneously and accurately send and receive communication through sign language to a deaf person.

Eleven: In the Fall of 1977, plaintiff requested the University of Texas at Austin to provide funds for the payment of an interpreter so that he could attend classes at that institution. In a letter dated October 21st, 1977 defendant, Ronald M. Brown, informed plaintiff that the University of Texas at Austin would not provide such funds: See attached, Exhibit No. 1.

Twelve: In a letter dated October 22nd, 1977 plaintiff again requested that the University of Texas at Austin provide funds for the payment of interpreters: See attached, Exhibit No. 2.

Thirteen: Plaintiff submitted a similar request to the Texas Rehabilitation Commission, which advised plaintiff that the Commission would not provide plaintiff with funds for interpreter services.

Fourteen: Plaintiff, through his attorney, again requested that the University of Texas provide funds for interpreter services in a letter dated December 12, 1977: See attached, Exhibit No. 3.

Fifteen: The December 21, 1977 letter from defendant university contained yet another refusal to provide funds for interpreter services: See attached, Exhibit No. 4.

Sixteen: Defendants to this date have not provided interpreter services to plaintiff, who has been a student at said university in good standing. He paid $1,245.00 for interpreter services for nine courses at the University of Texas at Austin during his graduate studies.

Seventeen: Defendant, Lorene L. Rogers, on behalf of the University of Texas at Austin, has signed and filed an Assurance of Compliance form, agreeing to comply with Section 504 of the Rehabilitation Act of 1973, as a condition to receiving federal financial assistance.

Eighteen: University of Texas at Austin receives federal financial assistance in excess of $31,400,000.00. The budget of the University of Texas at Austin, for the year ending August 31, 1978, is in excess of $200,000,000.00.

And, your Honor, that is our stipulation, and we ask the University to agree with that stipulation.

Ms. Allan: Defendants do agree to that stipulation, your Honor.

MR. CHARMATZ: Your Honor, we have one witness, which I would like to call now.

I would like to have the exhibits that are mentioned in the stipulation introduced. I previously referred to them; the letter of October 21st, 1977—

THE COURT: Have they been marked?

MR. CHARMATZ: Yes, sir.

THE COURT: All right.

MR. CHARMATZ: As Exhibit 1, the letter from Mr. Camenisch, dated October 22nd, 1977, and Exhibit 2—

THE COURT: Is there any objection to the exhibits?

Ms. Allan: Insofar as these are the exhibits to the Stipulation of Facts; is that correct?

MR. CHARMATZ: That is correct.

Ms. Allan: We have no objection, your Honor.

THE COURT: They will be admitted.

(said exhibits were admitted in evidence)

MR. CHARMATZ: I would like to call Mr. Camenisch to testify.

(witness was sworn through the interpreter)

WALTER CAMENISCH, testified through the interpreter, as follows:

DIRECT EXAMINATION QUESTIONS BY MR. CHARMATZ:

Q. Would you please state your name and address?

A. My name is Walter Camenisch, my address is 4705 Trail Crest Circle, Austin, Texas, 78735.

Q. And who is your employer?

A. I work at the Texas School for the Deaf.

Q. And what is your position at that school?

A. My duty is responsible for 18 house parents and about 80 children who live on the East Campus. I am supervisor —I supervise house parents and individuals in that position; I am responsible for schedules, evaluation, providing in-service training for them, and also I am responsible for 80 children after school. So, I have two recreation people to work with me, who make some plans for different activities, and also I have my assistant to the Dean of Students, who is responsible for children's trust funds and transportation, and also I have a secretary who takes care of all my phone calls and do all those extra jobs.

Q. Are you now enrolled in the University of Texas at Austin?

A. Yes.

Q. What services, if any, do you need to accommodate your hearing loss?

A. I really need a qualified interpreter and good note papers.

Q. Has the university ever assisted you in obtaining these services?

A. No.

Q. Why do you need an interpreter?

A. Because, really, it is difficult for deaf people to try to read lips—or to try to lip read. And you can't tell the professor to try to face you at all times, because most of the time the professor wants to move around, tries to write on the blackboard at the same time as he is talking, and I will not be part of the class. Like, for example, I may not be able to give my experiences or share some information with my classmates, because I cannot talk orally to the classmates. And I would not be able to ask the professor ques-

tions; that I really need an interpreter to help me get that kind of information from the professor. And some students may sit behind me and I am not able to read their lips because they are behind me. Some students may ask the professor some questions and I would miss a lot.

Q. Have you ever taken a course at the University of Texas without an interpreter?

A. Yes. I took one course way back in 1972, during the Summer. It was my first time to take a course at U.T. and I thought I could do without an interpreter, but I made a big mistake; that is the first time I got a "C." That is the only course where it resulted in a "C" grade. I remember one professor came to see me after that class, and the professor wanted me to pay attention to him; he felt that it was not right for me to be reading my book or writing while he lectured to the group, and I told him, "I can't help it, I don't have a skill to read your lips."

Q. And you are in the graduate school now. What would happen if you received a "C" grade in graduate school?

A. I understand that in graduate—that the graduate school requires all students to have a "B" or better grade; so if I made a "C", I might not get my master's degree.

Q. What plans do you have for the Summer, regarding enrollment in the University of Texas?

A. I plan to take one course this Summer. This course is called psychology of human learning, and I know that this course is going to require a lot of lectures, so I am going to have to need interpreters again.

MR. CHARMATZ: Your Honor, I have no other questions.

THE COURT: When is the time—deadline on the school starting on this course?

MR. CHARMATZ: Your Honor, I think Mr. Camenisch knows the answer to that question.

THE WITNESS: What was the question?

THE COURT: When is the deadline, timewise, for the beginning of the course?

THE WITNESS: I think June 6th—I think.

THE COURT: All right.

CROSS-EXAMINATION

QUESTIONS BY MS. ALLAN:

Q. Mr. Camenisch, during your graduate education, how many courses have you taken with an interpreter?

A. I took nine courses with an interpreter so far.

Q. Were you ever refused permission to have that interpreter in the classroom?

A. No. No, I always ask the professors if it is all right with them for me to have the interpreter in the classroom, and all of them have said, "Yes, it is okay."

Q. How many hours, semester hours, do you have to complete your master's degree?

A. Three hours.

Ms. Allan: I have no further questions.

MR. CHARMATZ: Your Honor, we ask the Court to take judicial notice of the statement in the Federal Register of Friday, February 17, 1978; we ask that it be marked as Plaintiff's Exhibit No. 6, which indicates that with respect to new complaints of the department of H.E.W. that—for new complaints for the fiscal year 1978—that 26 out of 756 complaints have been investigated by the department.

Ms. Allan: We have no objection, your Honor.

(Plaintiff's Exhibit 6 received)

MR. CHARMATZ: We would also ask that the Department of H.E.W. News, U.S. Department of Health, Education and Welfare, statement by Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, be admitted as Plaintiff's Exhibit No. 7

Ms. Allan: Your Honor, defendants do object to this as being irrelevant, as being less than the best evidence, since the regulations themselves are within the judicial knowledge of the Court and have been referred to in the pleadings of both parties, and as being hearsay and that we have no idea who actually wrote this document.

THE COURT: What is that instrument?

MR. CHARMATZ: It is the statement that Secretary Califano made at the time of the signing of the regulation. It is dated April 28, 1977 and it contains, as I said, the statement of Secretary Califano. It is published by the U.S.

Government printing office; it has the Health, Education and Welfare news insignia on the front.

THE COURT: It'll be admitted.

(said exhibit was admitted)

MR. CHARMATZ: Your Honor, that concludes the plaintiff's case.

THE COURT: Do you have any questions of the witness?

Ms. Allan: I have no further questions, your Honor. Thank you.

THE COURT: All right.

Ms. Allan: Your Honor, I am Martha Allan, of the Attorney General's office of the State of Texas, and represent the defendants in this case. We do not plan to call any witnesses, in view of the Stipulation of Facts, which has been entered into by the parties, and we will be ready to argue at such time as the Court desires.

THE COURT: Do you want to go forward with any statements at this time, any argument?

MR. CHARMATZ: Yes, your Honor.

THE COURT: Go ahead.

MR. CHARMATZ: Your Honor, this is a Motion for Preliminary Injunction, and I am sure the Court is very well aware of the First and Fifth Court standards for the issuance of a preliminary injunction.

The first standard is the substantial likelihood that the plaintiff will prevail on the merits. In this case, plaintiff certainly has a statutory right to have the regulation interpreted and to have the interpreter provided, as stated in section 84.44(d) of the regulation. That states that a recipient, to which this part applies, shall take such steps as are necessary to insure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to, discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids to students with impaired sensory, manual or speaking skills.

It goes on to state that interpreters are an example of an auxiliary aid. The stipulation 17 points out that the univer-

sity has, in fact, received some—has signed an Assurance of Compliance form, which means that they have agreed to be bound by this regulation, and that is the condition for their receiving in excess of $31,000,000.00, which is stated in the Stipulation of Fact, number 18. In similar instances, courts have granted, as a matter of preliminary relief, interpreters for deaf students.

For example, in the Crawford case, which we refer to in our brief, the Court stated: The Congress has inacted the rehabilitation act of 1973, and H.E.W. has formulated regulations which indicate that plaintiff has the right at sometime to receive that which he seeks in his complaint. And that compiaint, your Honor, we were seeking the services of an interpreter for the University of North Carolina, and also a very large public institution.

So, in this instance the first part of the four-part test, a substantial likelihood that plaintiff will prevail on the merits is more than a substantial likelihood, it is a high probability that that will be the case.

The next test is whether or not the plaintiff will suffer irreparable harm if an injunction is not granted, and in this case I refer to stipulation number nine and number ten. Number nine talks about the idea that Mr. Camenisch needs a qualified interpreter in order to successfully participate in and complete the academic program, and otherwise he will not be able to earn his master's degree and he will lose his position as acting Dean of Students. We can think of no more irreparable harm than the loss of a job.

And, as stated in the Barnes vs. Converse College case, the refusal to grant plaintiff relief at this time would defeat any rights she may have under the statutes and the regulation by failing to give a fact to plaintiff's rights would cause her immediate and irreparable injury in the form of loss of employment. And further, in the Crawford case, the plaintiff seeking a graduate education credit is of less pressing concern than in the Barnes case, because he was presently employed and was not in danger of losing his job. Therefore, in the Crawford case, where it was not as immediate and as irreparable as in this case, the Court, nevertheless, granted the preliminary relief.

In addition, one of the cases in the Fifth Circuit has held that it is often loosely stated that the purpose of a preliminary injunction is to preserve the status quo. It must not be thought, however, that there is any particular magic in the phrase "status quo." The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo is causing one of the parties irreparable injury, it is necessary to alter the situation to—so as to protect the injured either by returning to the last uncontested status quo between the parties or by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury.

The focus always must be on prevention of the injury by proper order, not merely on preservation of the status quo. Your Honor, that is in the Canal Authority, State of Florida versus Callaway case. In this instance, we feel that there is no adequate remedy at law, because in this instance if a preliminary injunction were not issued, Mr. Camenisch may not be able to receive any relief. If the case were to go to H.E.W. first, and no investigations were made, and as a result of one of the exhibits, Exhibit No. 6, that H.E.W. has indicated only 26 complaints would be investigated out of 756 that are estimated, he will not have his complaint investigated by the end of this Summer, and then it'll be questionable whether or not he would be able to recover any moneys after payment for interpreter services.

More importantly, in this instance, we feel the university has been in continual violation of the regulation since June 3rd of 1977, the date that the regulation took effect. And by the payment of $1,245.00 by Mr. Camenisch, that it has been in constant violation of the regulation, which we feel is very, very clear on that point.

So, without there being an adequate remedy at law at this time, we feel that the Court should grant the preliminary relief so as to protect Mr. Camenisch's rights, either

at some future day by the Court or by an H.E.W. investigation.

The third part of the four-part test on preliminary injunction is that the threatened injury to the plaintiff outweighs the threatened harm the injunction may do to the defendant. Your Honor, I don't think it takes much to know that the University of Texas is a very large university, receiving millions of dollars of federal financial assistance, and also having a budget in excess of $200,000,000.00. We have to look at that and look at Mr. Camenisch, who makes an income of $11,100.00 and has already expended, out of his own pocket, $1,245.00. In looking—or in balancing the harm, you have to look at the injury to the defendant to be the mere cost of one course during the Summer. With that we have to look at what Mr. Camenisch has already done, that is, the payment of $1,245.00. Certainly, when we balance the two, you can see that the Court—you can see that the University has gotten off very easy without having to pay any of this money. And that by not paying now, Mr. Camenisch, as we pointed out, may not be able to recover. The Crawford case points this out.

The Crawford case says: The Court has before it no information as to the amount of federal financial aid received by the University of North Carolina, nor whether the university has received separate funding for handicapped programs. Nevertheless, the courts has no doubt that the university would be better able to pay the cost.

Finally, your Honor, the last test for preliminary injunction is the test that the public interest demands that plaintiff's rights be protected by a preliminary injunction. Again, in the Crawford case, as the Court pointed out, moreover, in considering the final facts relevant in considering preliminary injunctive relief, the Court notes that public interest lies on the side of plaintiffs.

Congress has enacted the rehabilitation act of 1973 and H.E.W. has formulated regulations which indicate plaintiff has the right at sometime to receive that which he seeks in the complaint. While injunctive relief, in this particular case, does not preserve the status quo, the mandatory in-

junctive relief does serve to enforce the federal statutes and regulations under which plaintiff has a probable right to protection.

And, your Honor, finally we feel, in conclusion, we feel that the regulation is clear, the irreparable harm to the plaintiff is clear, the lack of any harm to the defendants is also clear. Secretary Califano—or in the Federal Register—points out something which I think is directly on point, and it is in the preamble to the regulation, and I think this is really the heart of the matter, it states: There is overwhelming evidence that in the past, many handicapped persons have been excluded from programs entirely, was denied equal treatment, simply because they are handicapped, but eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicap, making necessary in a number of context in order to insure equal opportunity.

Thus, for example, it is meaningless to admit a handicapped person in a wheelchair to a program if the program is only offered on the third floor of a walk-up building, nor is one providing equal educational opportunities to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instructions. These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from Section 504 or this regulation. Congress's mandate to end discrimination is clear.

Thank you, your Honor.

Ms. Allan: Your Honor, I will be as brief as possible. I believe that the main issues in this case, which deal with all the requisites for the granting of a preliminary injunction hinge upon the forum in which this case is brought.

This case is brought in a federal court, from which the pleadings in the case it is clear there has been no complaint

filed with the Secretary of Health, Education and Welfare. If the Secretary of Health, Education and Welfare were to promulgate these regulations, under the authority of this statute and the department which he heads does not choose to provide guidance as their interpretation, to provide relief for the class of people that is sought under that statute, then the Secretary of Health, Education and Welfare and that department should be the subjects of the lawsuit, not the University of Texas. It is, in fact, the regulation which is at issue and the interpretation of that regulation. The plaintiffs have cited the provision dealing with auxiliary aids, stating that a recipient to which this sub-part applies shall take such steps as are necessary to insure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under the education program or activity because of the absence of education auxiliary aids to students with impaired sensory, manual or speaking skills; it does not say the recipients shall provide. Surely if that was what was intended, that would have been a much less burdensome and much clearer way in which to express it.

Further, while it is true that as the plaintiffs state, that auxiliary aids, it is said, may include interpreters, following that statement is the statement: Recipients need not provide attendants individually prescribed devices, readers for personal use or study or other devices or services of a personal nature. The University of Texas, as is stipulated, is a State supported university; it has a responsibility to all its students and to those who support it. It must see that those funds which it administers are used to help those who need it the most. Consistent with that obligation, and consistent with the rules and regulations under this statute, the University of Texas has taken the necessary steps, as is shown in the Stipulation of Facts, to see that the handicapped student is not denied the benefits of his educational program.

It is stipulated that he did not meet their criteria for financial assistance; it is stipulated that he and his wife together have an income of over $23,000.00. The exhibits

attached to that Stipulation of Facts clearly indicate the position of the University of Texas, that consistent with their duties as the university and consistent with their duties and the spirit that these rules and regulations, they were seeking to make certain that they had taken whatever steps they could to see that this student had an interpreter. And in fact, as is stipulated, he did have an interpreter. He has testified that he was never denied the use of that interpreter in the classroom.

This injunction is not being brought to ask that the University of Texas allow this man to have an interpreter in the classroom; they have already done this. They have already taken whatever steps they could take to see that he had one. This injunction is being asked that the University provide that interpreter for the personal service to that student from funds from which it must spend moneys in its trust position as a State supported university. Because the university feels that this is a trust and because it would seek resolution of this in the forum where it should be resolved, that is, through the Secretary in the department which promulgated these rules and regulations, we would urge that in view of the fact that there has been no complaint filed with that department, in view of the fact that those regulations are not clear on their face and in view of the fact that there is, therefore, no showing that there is any jurisdiction in this court, or at this present time any probable cause of action, that the burden for preliminary injunctive relief cannot be met.

MR. DeBOW: Your Honor, since the defendants did not file any answer to our Motion for Preliminary Injunction, I just wanted to reply shortly to the points that she raised.

In particular, to bring to the Court's attention that the defendant raises that it is not the responsibility of the University to provide the interpreter services. And, in fact, the University has not taken any steps which are required under the regulation to make the classroom accessible. The burden has been borne, as the stipulation shows, by Mr. Camenisch. And I wish to point out to the Court, a recent Fourth Circuit Court decision of Davis versus Southeast-

ern Community College, handed down March 28th by the Fourth Circuit, where the Court stated that both the regulation, and specifically on auxiliary aid sections, and precedence supports the requirement of an affirmative conduct on the part of certain entities, under Section 504, even when such modifications become expensive. In that case it involved a hearing impaired nurse, and the Fourth Circuit Court said that the specific regulation we are talking about today, auxiliary aid, is an affirmative obligation that the college, the recipient, must provide and that expense is not a valid overriding consideration.

And we wish to also point out that when the University makes their buildings accessible by providing ramps, or making the building structure accessible to a wheelchair student, they do not request that handicapped students in a wheelchair to submit to a financial needs test, but they are asking that a deaf student participate in that same classroom also—they are requesting this person the added burden of submitting to a financial needs test. That is not fair, to submit one handicapped group, deaf people, to the financial needs test and not to wheelchair people, especially when the regulation is clear that schools, recipients of federal financial assistance, are to make all their facilities open and accessible to a deaf person; that means providing an interpreter in the classroom so they can understand what happens.

So, we also wish to point out that the question of not filing a complaint with the Office of Civil Rights has been raised by the defendant. It is well settled law, as we point out in our memorandum, that administrative remedies need not be sought if they are inadequate. And the O.C.R. plan, which we introduced, indicates that inadequacy.

Also, there are no emergency provisions within H.E.W. regulations, so that he cannot get the relief he needs by this Summer. And finally, plaintiff need not exhaust administrative remedies, for to do so would cause irreparable harm, as in the Martinez versus Richardson case of the Tenth Circuit, 472 federal second, 1121, pointed this out and said it is especially true where time is crucial to protect

the rights of the individual, and the administrative remedies would involve delay.

And we have here in stipulation nine that there is the irreparable harm that the defendant, Mr. Camenisch, if he cannot get interpreter services provided to him so he can successfully complete the course and get his master's degree and keep his position.

Many courts have recognized the private right of action, and that is cited in our memorandum. Four Circuit Courts of Appeal have already recognized a private right of action. The U.S. Government has recognized that a private right of action is a supplemental right that should be used.

And we would finally close by saying that in the Crawford decision they offered the plaintiff a preliminary injunction to protect the plaintiff's rights while telling him to file a complaint with H.E.W., but having the injunction to protect his rights in the future. And it was also pointed out in the Davis case by the Fourth Circuit, that the courts, if exhaustion is required, should give consideration to some preliminary injunction relief.

And finally, in Barnes, it is pointed out that the refusal to grant the plaintiff any relief at the time of the preliminary injunction hearing would defeat any right of the plaintiff; and that is equally clear here where we have a similar situation of loss of employment.

Thank you.

THE COURT: Is there anything further?

Ms. Allan: Nothing, your Honor, except I would like to answer one statement so that I will not create confusion.

The Motion to Dismiss and Answer, which I filed, was filed when I had received the injunction, and the Complaint and was filed in response to the injunction as well as to the Complaint.

THE COURT: This matter will be taken under advisement, and I will have something on it just as soon as I can.

(proceedings ended)

Reported Certificate Omitted

PLAINTIFF'S EXHIBIT 6

PLANNED COMPLAINT PROCESSING ACTIVITY— FY 1978

National Totals

Available Investigative Person Years 243.13

BASIS	Carryover Complaints			Backlog Complaints			New Complaints				
	Workload *1/*	Number to be Completed	Person Years	Workload *2/*	Number to be Investigated	Person Years	Projected FY 1978 Receipts	Person Years for Intake *3/*	Workload after Intake *4/*	Number to be Investigated	Person Years
RACE	652.2	601.7	66.18	261.5	21	3.29	1192	5.24	1048	45	7.05
SEX	1090.7	963.7	106.02	284.5	14	2.19	1141	5.02	1004	33	5.17
NATIONAL ORIGIN	171.5	161	17.70	71	6	.94	245	1.07	216	16	2.50
HANDICAP	112.6	101.6	11.18	453	14	2.20	756	3.31	664	26	4.07
TOTALS	2027	1828	201.08	1070	55	8.62	3334	14.64	2932	120	18.79

1. "Carryover complaints" means complaints in which the data and information gathering phase of the investigation began prior to 10/1/77.
2. "Packlog complaints" means complaints on hand as of 10/1/77 in which the data and information gathering phase of the investigation has not begun.
3. "Intake" means the initial review of incoming complaints, the acknowledgement, the determination of completeness and jurisdiction, and the completion of incomplete complaints.
4. Approximately 12% of all complaints received are outside the jurisdiction of OCR and are therefore eliminated from the complaint workload.

Federal Register, Vol. 43, No. 34—Friday, February 17, 1978

NOTICES

PLAINTIFF'S EXHIBIT 7

HEW NEWS
U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

CONTACT: PETER LIBASSI/DAN MARCUS
202/245-7741

FOR IMMEDIATE RELEASE
Thursday, April 28, 1977

Statement
by
Joseph A. Califano, Jr.
Secretary of Health, Education, and Welfare

For decades, handicapped Americans have been an oppressed and, all too often, a hidden minority, subjected to unconscionable discrimination, beset by demoralizing indignities, detoured out of the mainstream of American life and unable to secure their rightful role as full and independent citizens.

Today I am issuing a regulation, pursuant to Section 504 of the Rehabilitation Act of 1973, that will open a new world of equal opportunity for more than 35 million handicapped Americans—the blind, the deaf, persons confined to wheelchairs, the mentally ill or retarded, and those with other handicaps.

The 504 Regulation attacks the discrimination, the demeaning practices and the injustices that have afflicted the nation's handicapped citizens. It reflects the recognition of the Congress that most handicapped persons can lead proud and productive lives, despite their disabilities. It will usher in a new era of equality for handicapped individuals in which unfair barriers to self-sufficiency and decent treatment will begin to fall before the force of law.

The 504 Regulation will work fundamental changes in many facets of American life. In many cases this regulation calls for dramatic changes in the action and attitudes of in-

stitutions and individuals who are recipients of HEW funds. In implementing the unequivocal Congressional statute, this regulation opens a new era of civil rights in America.

For example, the regulation imposes the following requirements on recipients of HEW funds:

> All new facilities must be barrier-free, i.e., readily accessible to and useable by handicapped individuals.
>
> Programs or activities in existing facilities must be made accessible to the handicapped within 60 days, and, if no other alternatives—such as reassignment of classes or home visits—will achieve program accessibility, structural changes in the facilities must be made within three years. No exceptions to the program accessibility requirement will be allowed.
>
> Employers may not refuse to hire handicapped persons, if reasonable accommodations can be made by them to an individual's handicap and if the handicap does not impair the ability of the applicant or employer to do the specific job.
>
> Employers may not require pre-employment physical examinations and may not make a pre-employment inquiry about whether a person is handicapped, or the nature or severity of a handicap, although employers may make a pre-employment inquiry into an applicant's ability to perform job-related functions.
>
> Every handicapped child will be entitled to free public education appropriate to his or her individual needs, regardless of the nature or severity of the handicap. In those unusual cases where placement in a special residential setting is necessary, public authorities will be financially responsible for tuition, room and board.
>
> Handicapped children must not be segregated in the public schools, but must be educated with the non-handicapped in regular classrooms to the maximum extent possible.

Education institutions must undertake each year to identify and locate unserved handicapped children.

Colleges and universities must make reasonable modifications in academic requirements, where necessary, to ensure full educational opportunity for handicapped students.

Educational institutions and other social service programs must provide auxiliary aids, such as readers in school libraries or interpreters for the deaf, to ensure full participation of handicapped persons.

All recipients of HEW funds must complete within one year a self-evaluation process, in consultation with handicapped individuals and organizations, to determine which of their policies and practices need to be changed to assure equal opportunity for handicapped Americans.

The far-reaching changes wrought by the 504 Regulation are required by an act of Congress that broadly commands: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

This Act of Congress—the first major Federal law protecting the civil rights of handicapped persons—covers those individuals who have a physical or mental impairment which substantially limits a major life activity. In response to my request for guidance, Attorney General Griffin Bell, on April 12, 1977, issued a formal opinion stating, "It is our conclusion that alcoholics and drug addicts are 'handicapped individuals' for purposes of . . . Section 504."

The regulation promulgated today applies only to programs funded by the Department of Health, Education, and Welfare. But this regulation will be the basis for other similar regulations that will be issued by all other Federal departments and agencies and that will affect all recipients of federal funds.

This regulation not only bars recipients of HEW funds from unfairly excluding handicapped individuals, but it also requires positive steps to give handicapped citizens meaningful equality of opportunity in employment and in health, education and social service programs.

Discriminatory practices directed toward handicapped persons—just like those directed at racial minorities and women—are often deeply ingrained. We must recognize that positive steps will, in some instances, be required so that handicapped individuals are able to learn, to work, and to compete on a fair and equal basis. Admitting a deaf child to a class, for example, is a meaningless gesture unless an interpreter is also available to communicate the teacher's words.

The regulation issued today is built upon two and a half years of work by the HEW staff under the previous administration and three months of intensive study and review by me and a special task force which I created in February and which has been headed by Peter Libassi, the General Counsel-designate, and Arabella Martinez, the Assistant Secretary for Human Development.

Drafting a regulation has been a most difficult task because Section 504 prohibits discrimination against the handicapped in broad and unequivocal terms and yet the Congress enacted the Section without legislative hearings and with virtually no floor debate in either House. There is, thus, little Congressional guidance on the host of complex issues raised by Section 504's far-reaching prohibition against discrimination.

This lack of Congressional guidance doubtless contributed to my predecessor's decision not to sign a 504 regulation before he left office, despite the fact that the law had been in effect for 2½ years, but merely to send a draft regulation back to Capitol Hill in mid-January.

Shortly after assuming office, it was obvious to me that I could not sign a 504 Regulation without carefully reviewing the issues and determining that the regulation I would promulgate met the legitimate needs of handicapped individuals, conformed to the far-reaching intent of Congress,

as best we could discern it, and dealt forcefully, yet fairly, with recipients of Federal funds.

In recent weeks, either I or members of the Task Force have met seven times with organizations representing handicapped individuals. One of these meetings lasted two days and brought together 45 handicapped organizations and HEW program managers for the purpose of developing agency-by-agency compliance plans. During this same period, there have also been meetings with recipients of HEW funds, including educational organizations, health organizations, and representatives of mayors, governors and county executives.

During the course of our deliberations on the regulation, we have been able to shorten the previous draft of the regulation by at least 20 percent, largely by eliminating redundancies.

We have simplified and clarified that draft regulation so that it will be more understandable to handicapped individuals, HEW recipients and other interested parties, although any regulation requiring such major changes will, of necessity, retain some complexity.

We have also made revisions in the previous draft aimed at reducing red tape for all recipients, at allowing small recipients more flexibility in meeting the far-reaching objectives of the regulation, and in sharply reducing unnecessarily cumbersome notice requirements.

In sum, the regulation issued today reflects my best judgment of how Congress intended that the broad, uncompromising statutory command of Section 504 should be translated into specific rules that vindicate the rights of handicapped citizens and that deal firmly, yet sensibly, with those recipients of Federal funds who will be subject to significant new requirements.

I am today sending to each member of the Congress the regulation as issued. I have asked each member to join with me in careful monitoring of the process by which Section 504 and this regulation are implemented. The power to illuminate further our national policy to end discrimination against the handicapped—and to instruct me as to whether

I have exceeded or fallen short of legislative intent—resides, of course, with the Congress.

Congress has another important role in making Section 504 a creative instrument for effecting needed change. It must carefully assess whether additional funds will be necessary if recipients are to comply promptly with the Congressional mandate and the regulation implementing that mandate. I will aggressively seek new federal monies under the Education for the Handicapped Act to help elementary and secondary schools meet their obligations.

I have asked David Tatel, the new Director of the Office for Civil Rights, and Arabella Martinez, Assistant Secretary for Human Development, to establish a special technical assistance unit, calling upon all the skills available throughout the Department, in order to help HEW recipients comply with this regulation. I will seek whatever additional funds are necessary to make certain that we have adequate resources to provide such technical assistance.

The 504 Regulation today becomes the law of the land, and it is critically important that we obey that law and make these new rules a reality for handicapped Americans.

In implementing the regulation, I pledge that HEW will move promptly and firmly but I also pledge that we will be guided by sensitivity, fairness and common sense.

I ask today that all parties affected by this regulation also be guided by those qualities as we begin the arduous process of implementation—a process which will no doubt be controversial.

For example, implementing the Congressional determination that drug addicts and alcoholics are covered by Section 504 will require special sensitivity, fairness and common sense. We must recognize, on the one hand, that the law says it is unjust to discriminate against individuals simply because they suffer from the disease of addiction or alcoholism. But the regulation clearly contemplates that recipients of federal funds can make decisions on the basis of an individual's behavior caused by such diseases.

As the Attorney General's opinion concludes: ". . . the statute does not require the impossible. It does not unre-

alistically require the recipients of Federal contracts and grants to ignore all the behavioral or other problems that may accompany a person's alcoholism or drug addiction if they interfere with the performance of his job or his effective participation in a federally assisted program."

Section 504 and this regulation constitute a striking recognition of the civil rights of America's handicapped citizens, just as Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, and their companion regulations, are critical elements in the structure of law protecting the civil rights of racial minorities and women.

In Section 504, the Congress enacted a charter of equality to help end the shameful national neglect of handicapped individuals and to translate many of their legitimate needs into legal rights.

MEMORANDUM OPINION AND ORDER
(of the District Court)
Reproduced in PETITION FOR WRIT OF CERTIORARI

JUDGMENT
(of the District Court)
Reproduced in PETITION FOR WRIT OF CERTIORARI

NOTICE OF APPEAL
OMITTED

ORDER DENYING APPLICATION FOR STAY
OMITTED

Preliminary
Injunction Undertaking

Caption Omitted

Walter Camenish, the Plaintiff, and National Surety Corporation surety, submitting ourselves to the jurisdiction of the Court, hereby undertake for ourselves and each of us, our and each of our heirs, executors, administrators, successors, and assigns, to make good to the defendants all damages not to exceed the sum of Three Thousand and No/100 Dollars ($3,000.00) by _____ suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the Court shall direct, and that, on dissolving the injunction, the Court may give judgment thereon against the principal and surety for said damages in the decree dissolving the injunction, or in a further decree after ascertainment of the amount of said damages.

Walter Camenish /s/
Walter Camenish

NATIONAL
SURETY
CORPORATION
James E. Abney /s/
James E. Abney,
Attorney-in-Fact

APPROVED: *June 6 /s/, 1978*
Jack Roberts /s/, Judge

NATIONAL SURETY CORPORATION

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That NATIONAL SURETY CORPORATION, a Corporation duly organized and existing under the laws of the State of Illinois, and having its Home Office in the City of Chicago, Illinois, has made, constituted and appointed, and does by these presents make, constitute and appoint JAMES E. ABNEY, AUSTIN, TEXAS, its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, seal, acknowledge and deliver any and all bonds, undertakings, recognizances or other written obligations in the nature thereof and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the corporate seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises.

This power of attorney is granted pursuant to Article VIII, Section 29 and 30 of By-laws of NATIONAL SURETY CORPORATION now in full force and effect.

> "Article VIII. *Appointment and Authority of Resident Assistant Secretaries, and Attorney-in-Fact and Agents to accept Legal Process and Make Appearances.*
>
> Section 29. *Appointment.* The Chairman of the Board of Directors, the President, any Vice-President or any other person authorized by the Board of Directors, the Chairman of the Board of Directors, the President or any Vice-President, may, from time to time, appoint Resident Assistant Secretaries and Attorneys-in-Fact to represent and act for and on behalf of the Company and Agents to accept legal process and make appearances for and on behalf of the Company.

Section 30. *Authority.* The Authority of such Resident Assistant Secretaries, Attorneys-in-Fact, and Agents shall be as prescribed in the instrument evidencing their appointment, and any such appointment and all authority granted thereby may be revoked at any time by the Board of Directors or by any person empowered to make such appointment.

This power of attorney is signed and sealed under and by the authority of the following Resolution adopted by the Board of Directors of NATIONAL SURETY CORPORATION at a meeting duly called and held on the 7th day of September, 1972, and that said Resolution has not been amended or repealed:

"RESOLVED, that the signature of any Vice-President, Assistant Secretary, and Resident Assistant Secretary of this Corporation, and the seal of this Corporation may be affixed or printed on any power of attorney, on any revocation of any power of attorney, or on any certificate relating thereto, by facsimile, and any power of attorney, any revocation of any power of attorney, or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Corporation."

IN WITNESS WHEREOF, NATIONAL SURETY CORPORATION has caused these presents to be signed by its Vice-President, and its corporate seal to be hereunto affixed this 6th day of June, 1977.

NATIONAL SURETY CORPORATION
By /s/ William W. Lauber
Vice-President

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO ss.

On this 6th day of June, 1977, before me personally came William W. Lauber to me known, who, being by me duly sworn, did depose and say: that he is Vice-President of NATIONAL SURETY CORPORATION, the Corporation

described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year herein first above written.

/s/ Susie K. Gilbert
Notary Public
CERTIFICATE
OFFICIAL SEAL
SUSIE K. GILBERT
NOTARY PUBLIC–CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires Nov. 19, 1980

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO

I, the undersigned, Assistant Secretary of NATIONAL SURETY CORPORATION, an Illinois Corporation, DO HEREBY CERTIFY that the foregoing and attached POWER OF ATTORNEY remains in full force and has not been revoked; and furthermore that Article VIII, Sections 29 and 30 of the By-laws of the Corporation, and the Resolution of the Board of Directors, set forth in the Power of Attorney, are now in force.

Signed and sealed at the City and County of San Francisco. Dated the *5th* day of *June, 1978*.

Jeffrey S. Wilson /s/
Assistant Secretary

COMPLAINT ON BEHALF OF WALTER CAMENISCH (To HEW)

OMITTED

Caption Omitted

PLAINTIFF'S FIRST INTERROGATORIES

Plaintiffs request that the Defendants upon whom these interrogatories are served, by an officer or agent who shall furnish such information as is available to said Defendants, answer the following interrogatories separately and fully in writing and under oath, pursuant to Rule 33 of the Fed. R. Civ. P., and that said answers be signed by the person making them and be served on the undersigned attorneys for Plaintiffs, within thirty (30) days after the service of these interrogatories or within such other time as is ordered by the Court.

PRELIMINARY STATEMENT

1. In answering these Interrogatories, furnish all information which is available to you, including information in the possession of your assignors, assignees, agents, employees, representatives and all others from whom you may freely obtain it as well as from your attorneys and their investigators. Where the answers are based on statements of others and do not represent your personal knowledge, explicitly so indicate, naming the person or persons relied upon.

2. If you cannot answer any one, or any sub-part, of these Interrogatories in full, after exercising due diligence to secure the information to do so, explicitly so state. Answer every other Interrogatory and sub-part, and give any information in your possession which may partially answer the Interrogatory or sub-part which you cannot answer in full, or which may lead to Plaintiffs' discovering the answer thereto.

3. The term "in writing" as used herein means all memorializations, whether written, photographic, tape-recorded or otherwise. It includes all business or other records, reports, papers, documents, photographs, books, letters, notes, memoranda, tape recordings, or any other corre-

spondence, whether in your possession or under your control or not, relation to or pertaining in any way to the subject matter in connection with which it is used. It includes without limitation all file copies and all drafts prepared in connection with such writings whether used or not.

4. A request that a "writing" be identified or described calls for the following information concerning it:

a. Its nature, e.g., letter, memorandum, contract, report, record, photograph, tape recording, etc.;
b. Its title, if any;
c. The date it was sent;
d. The date it was received;
e. The identity of the person sending it;
f. The identity of the person or persons who prepared it or participated in its preparation in any way or signed it;
g. A brief summary or description of its contents;
h. Whether Defendant and/or attorney will voluntarily make said writing available to Plaintiffs' attorneys;
i. Please state the name and address of the present custodian of each such record, account or writing and the location in which each is presently kept; or in the alternative, attach copies of each said record, account or writing to your answers to these interrogatories.

5. As to each party, person, or individual mentioned or referred to in an answer to any Interrogatory, state his name, his address, and his last known occupation and employment or business or professional affiliation.

6. These Interrogatories are to be deemed continuing and the Defendants are under a duty to supplement their answers hereto from time to time as new or further facts come into possession.

INTERROGATORIES

1. How many handicapped students are enrolled in the University of Texas at each of its campuses?

2. How many hearing-impaired students are enrolled in the University of Texas at each of its campuses?

3. Have any of the handicapped students enrolled in the University of Texas system requested auxiliary aids from the University? If so, what aids were requested?

4. If the University of Texas has provided interpreters for deaf students in the years 1977 and 1978, please state:

   a. Name of the students;
   b. The cost of providing the aid;
   c. Whether the University bore the cost of providing the aid.

5. If the University of Texas has provided readers for blind students in the years 1977 and 1978, please state:

   a. Name of the student;
   b. The cost of providing the aid;
   c. Whether the University bore the cost of providing the aid.

6. Please state the exact text of any rule which states that hearing-impaired students shall not be provided with an interpreter which is necessary in order for that student to effectively participate in a University program. Alternatively, please attach a copy of this rule.

7. State in dollars and cents the total amount of federal financial assistance received directly or indirectly by the University of Texas at each of its campuses during the 1977 and 1978 school years.

8. State in dollars and cents the total amount of federal financial assistance received directly or indirectly by the University of Texas at each of its campuses to provide auxiliary aids for blind students during the 1977 and 1978 school years.

9. State in dollars and cents the total amount of federal financial assistance received directly or indirectly by the University of Texas at each of its campuses during the 1977 and 1978 school years to remove architectural barriers.

10. Has the University of Texas received any other financial assistance or grants to provide services for handicapped students at the University. If so, state:

a. Source of the financial assistance or grant;
b. Amount of the financial assistance or grant;
c. Services to be provided by financial assistance and each grant;
d. Types of handicaps to which services were provided.

11. Please state the name, address, occupation and affiliation with defendants of the person answering or verifying the answers to these Interrogatives.

Signatures and Certificate Omitted

Caption Omitted

OBJECTIONS TO INTERROGATORIES

TO THE HONORABLE JUDGE OF SAID COURT:

Defendants have been served with Interrogatories by Plaintiff and respectfully object to such interrogatories and move the Court to excuse the filing of answers to such at the present time for the following reasons:

I.

This Honorable Court entered its Injunctive Order in the above styled cause on the 17th day of May 1978. In addition to granting the injunctive relief sought by Plaintiff, the Court's order required the filing of a bond and the filing of a complaint with the Department of HEW and stayed further proceedings "pending a final administrative determination on the merits." The Court subsequently entered a preliminary docket control order for discovery to begin immediately; however, Defendant believes that such docket control order was entered under the assumption that there would have been a final administrative determination by the time discovery was begun. The Department of HEW has not issued its findings in this case and Defendants therefore object to the interrogatories propounded by Plaintiff on the grounds that such interrogatories are not in order until after the exhaustion of administrative remedies in this case and are not in accord with the Court's Order of May 17, 1978 staying these proceedings. Defendants would further show that an appeal of the injunctive order has been filed in the Fifth Circuit raising the jurisdictional issues involved in Section 504 and a decision by the Fifth Circuit could obviate the need for further discovery in this cause.

II.

Defendants further object to interrogatories 1, 2, 3, 4, 5, 7, 8, 9 and 10 in that those interrogatories seek information which is not relevant to a party to this lawsuit. Such inter-

rogatories seek information which might possibly be relevant in a class action but can have no relevance to Mr. Camenisch's lawsuit which does not seek relief for anyone but himself. In particular, Defendants object to furnishing information concerning activities at all of the University of Texas System's campuses as plaintiff was only enrolled in and seeking relief from the University of Texas at Austin.

WHEREFORE, Defendants ask this Court to set a hearing on Defendant's Objections to Interrogatories and at the conclusion of such to stay discovery proceedings in this cause pending an administrative determination on the merits, or in the alternative, to excuse Defendants from answering Interrogatories 1, 2, 3, 4, 5, 7, 8, 9 and 10 in their entirety or alternatively to excuse Defendant from answering such interrogatories as to any campus other than the University of Texas at Austin.

Signatures and Certificate of Service Omitted

ORDER EXTENDING TIME FOR TRANSMITTING RECORD ON APPEAL

OMITTED